Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

The BOROUGH OF TENAFLY, ANN MOSCOVITZ, individually and in her official capacity as Mayor of the Borough of Tenafly, CHARLES LIPSON, MARTHA KERGE, RICHARD WILSON, ARTHUR PECK, JOHN SULLIVAN, each individually and in their official capacities as Council Members of the Borough of Tenafly,

Petitioners,

v.

TENAFLY ERUV ASSOCIATION, INC., CHAIM BOOK, YOSIFA BOOK, STEFANIE DARDICK GOTLIEB and STEPHEN BRENNER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether evidence of instances of non-uniform enforcement of a neutral, generally applicable law constitutes a "system of individual exemptions" sufficient to trigger strict scrutiny under *Employment Division v. Smith*, 494 U.S. 872 (1990).

2. Whether the existence of a system of individual exemptions requires an exemption for religiously motivated conduct under *Smith*, absent a showing that enforcement imposed a substantial burden on religious exercise.

3. Whether avoiding an Establishment Clause violation constitutes a compelling interest for declining to grant a religious exemption to a neutral, generally applicable law.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Borough of Tenafly is a public entity and municipal corporation; there is no parent or publicly held company owning any of its stock. All other petitioners are individuals.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The District Court's opinion (per Bassler, D.J.) denying a preliminary injunction and dissolving existing restraints (Appendix ("Pet. App.") 62a-172a) is published at 155 F. Supp. 2d 142. The court of appeals' opinion (per Ambro, J.) reversing the District Court and ordering a preliminary injunction (Pet. App. 1a-59a) is published at 309 F.3d 144. The court of appeals' order denying rehearing and rehearing *en banc* (*id.* 173a-174a) is not otherwise published.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and order on August 9, 2002 and denied rehearing and rehearing *en banc* on November 20, 2002. Justice Souter subsequently extended the time to file this petition for a writ of certiorari to and including April 19, 2003. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND MUNICIPAL ORDINANCE

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV §1.

> No person shall place any sign or advertisement, or other matter upon any pole, tree, curbstone, sidewalk or elsewhere, in any public street or public place, excepting such as may be authorized by this or any other ordinance of the Borough.

Tenafly, N.J., Ordinance 691 Article VIII (7) (1954).

STATEMENT OF THE CASE

In *Employment Division v. Smith*, 494 U.S. 872 (1990), this Court held that a "neutral law of general applicability" need not be subject to strict scrutiny even if the law has the incidental effect of burdening a particular religious practice. The Court went to some length to distinguish its prior holding in *Sherbert v. Verner*, 374 U.S 398 (1963), which had held that, under some circumstances, the Free Exercise Clause requires courts to carve out an exemption from a generally applicable law if: (i) the law substantially burdens a claimant's free exercise of a sincere religious belief; and (ii) the state cannot demonstrate that denying the claimant an exemption is necessary to serve a compelling state interest.

After noting that *Sherbert*'s applicability had been limited to "denial of unemployment compensation" cases, *Smith*, 494 U.S. at 883, the Court further narrowed *Sherbert*'s reach — even in the unemployment benefits context — to those situations in which "the State has in place a *system of individual exemptions*, [which] it may not refuse to extend . . . to cases of 'religious hardship' without compelling reason," *id.* at 884 (emphasis added) (internal citation omitted).

This petition presents important questions, on which the circuits are divided, regarding two distinct aspects of *Smith*'s limitation of *Sherbert*: first, whether evidence of instances of non-uniform enforcement of a neutral, generally applicable law is sufficient to trigger strict scrutiny under *Smith*; and second, whether under *Smith*'s individual exemptions model a substantial burden on religious exercise remains a necessary condition for requiring that an exemption be extended to religiously motivated conduct. The petition further presents another important question on which the circuits are divided: whether avoiding an Establishment Clause violation constitutes a compelling interest for government to deny an exemption for religiously motivated conduct.

A. Factual Background

The facts in *Tenafly* are straightforward and well developed. This case began when Respondent Tenafly Eruv Association, Inc. ("TEAI") approached first the Mayor, and then the Borough Council of Tenafly, N.J., with a request for a religious accommodation on utility poles within the Borough's right-of-way: TEAI sought to erect a permanent *eruv*, a notional wall or enclosure that, under Jewish law, permits observant Jews to carry and push objects in the public domain on the Sabbath. From the start, the Respondent TEAI

represented the *eruv* as a structure with religious significance; it informed the mayor that the *eruv* would enhance the quality of its members' religious lives.

A neutral, generally applicable Tenafly ordinance, enacted in 1954, specifies that "[n]o person shall place any sign or advertisement, or other matter upon any pole, tree, curbstone, sidewalk or elsewhere, in any public street or public place, excepting such as may be authorized by this or any other ordinance of the Borough." Tenafly, N.J., Ordinance 691 Article VIII (7) (1954). Respondent thus sought a religious exemption from the ordinance in order to place rubber stripping on the municipally-controlled utility poles to create the upright sections of the eruv. Respondent's application to the Borough Council therefore amounted to a request for an amended or new ordinance that would have permitted TEAI to use the utility poles on a permanent basis for a religious purpose.

The Tenafly Borough Council, recognizing that the ordinance prohibited attachment of the rubber stripping, declined to amend the ordinance so as to permit an exemption for religiously motivated use of the poles. The Borough Council reasoned that it would violate the Establishment Clause to grant a religious group preferential access to government property that was otherwise closed to public use.

No evidence was presented, nor was an allegation made, that anyone had ever sought an exemption from the ordinance before TEAI did so. There is no dispute either as to the existence of incomplete enforcement of Ordinance 691. Respondent introduced into evidence four photographs of street address numbers nailed into utility poles in violation of the ordinance, as well as two "lost pet" signs and two

"office for rent" signs. The Court referred to these items as "lost animal signs and other private postings" in the decision, Pet. App. at 3a, and found they had remained in place for some days without being removed. Evidence also showed that two local churches had posted directional signs on property that was determined by the District Court to have been municipal. In addition, each year during the winter holiday season, the Borough affixes seasonal decorations, paid for by the local Chamber of Commerce, to utility poles in the downtown area.[1]

B. Proceedings Below

TEAI and several individuals sued in the U.S. District Court for New Jersey, alleging free exercise, free speech, and Fair Housing Act violations, and sought a preliminary injunction against removal of the rubber strips. After hearing three days of testimony and oral argument, the District Court denied the injunction. Pet. App. at 62a. Relying on *Smith*, the District Court held that the Borough was under no duty to grant an exemption to its neutral, generally applicable ordinance. It also held that the utility poles were a non-public forum that could be closed to public speech, and dismissed the Fair Housing Act claims for lack of standing. *Id.* at 126a-142a, 156a-164a. The District Court further found that there was "*no evidence* to support a conclusion that the Borough Council acted out of animosity to Judaism in general or to Orthodox Jews in particular." Pet. App. at 146a-147a (emphasis added). Rather, "the fundamental reason animating

1. The Third Circuit also said that on one occasion "[o]range ribbons [signifying opposition to school regionalization] were attached to the Borough's utility poles for a lengthy period of time" and that Borough officials knew about them but made no effort to remove them, Pet App. 36a, a factual assertion about which the District Court said there was insufficient evidence in the record. *Id.* at 136a.

the Borough Council's decision was its concern that public property should not be permanently allocated to a religious purpose." *Id.* at 148a.

Respondent appealed to the Third Circuit, which reversed on free exercise grounds.[2] The Third Circuit found that the Borough "tacitly or expressly granted exemptions from the ordinance's unyielding language for various secular and religious — though never Orthodox Jewish — purposes," *id.* at 35a-36a, "making those actions sufficiently suggestive of discriminatory intent." *Id.* at 37a. According to the Court, this "selective, discretionary application of Ordinance 691," *id.* at 37a, was sufficient to trigger strict scrutiny under *Smith*. The court acknowledged that "if the Borough had enforced [Ordinance 691] uniformly, *Smith* would control and the [Respondent's] claim would accordingly fail." *Id.* at 35a. According to the Third Circuit, in-practice discretionary enforcement of the "often-dormant Ordinance 691" amounted to an instance of individualized exemption sufficient to trigger strict scrutiny, because by enforcing the ordinance against Respondent, the Borough implicitly "devalue[d]" Orthodox Jewish reasons for posting items on utility poles by "judging them to be of lesser import than non-religious reasons." *Id.* at 37a (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993)).

The Third Circuit then rejected the argument that Respondent's request for an exemption to use government property for religious purposes was governed by *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), which denied a free exercise claim by American

2. The Third Circuit held that the rubber stripping did not constitute speech for First Amendment purposes, and it sustained the District Court's denial of the Fair Housing Act claim.

Indians seeking to block construction on federal lands sacred to the Indians. The Court distinguished *Lyng* by saying that Respondent's request for an exemption was not a request for "preferential treatment," but rather a request "that the borough not invoke an ordinance from which others are *effectively exempt*." Pet. App. at 40a (emphasis added).

The Third Circuit went on to hold that, under *Smith* and *Lukumi*, "there is no substantial burden requirement when government discriminates against religious conduct" by differential enforcement via individualized exemptions. *Id.* The Third Circuit reasoned that, because *Smith* warned against "judging the centrality of different religious practices," *id.* (citing *Smith*, 494 U.S. at 887), it followed that the existence of a substantial burden was irrelevant under circumstances of individualized exemptions. The Third Circuit said that it was joining the Sixth Circuit against the weight of contrary decisions from the First, Second, Fourth, Fifth, Seventh, Eighth, Ninth, Eleventh and D.C. Circuits.

Finally, the Third Circuit held that the Borough of Tenafly had no compelling interest in avoiding the Establishment Clause violation that would have flowed from giving a religiously motivated applicant preferential access to government property. *Id.* at 49a. Dismissing the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in favor of an endorsement test, the Court said that a reasonable, informed observer would know that Respondent's conduct was religious and preferentially treated, "but would also know that the Borough was allowing [the rubber strips] to remain on utility poles only because its selective application of Ordinance 691 render[ed] removing the lechis a free exercise violation." *Id.* In essence, said the Third Circuit, "the Borough has no Establishment Clause justification for discriminating against the plaintiffs' religiously motivated conduct." *Id.* at 57a.

REASONS FOR GRANTING THE PETITION

It is well established under *Employment Division v. Smith* that a neutral, generally applicable law does not trigger strict scrutiny even when it has the incidental effect of burdening religiously motivated conduct. In so holding in *Smith*, however, the Court distinguished several cases in the unemployment context in which it had required strict scrutiny:[3] "our decisions in the unemployment cases stand for the proposition that where the State has in place a *system of individual exemptions*, it may not refuse to extend *that system* to cases of religious hardship' without compelling reason." *Smith*, 496 U.S. at 884 (emphasis added) (internal citation omitted). The Court further clarified the *Smith* touchstones of neutrality and general applicability in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, when it held that a law is not neutral if "the object of the law is to infringe upon or restrict religious practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. To determine the law's objective, the Court first examined the text of the law and second, the motivation behind the law. The Court's failure to explicate further the meaning of a "system of individual exemptions" and how it affects the neutrality and general applicability of a law has caused much confusion in the lower courts' free exercise jurisprudence.

An array of different tests has arisen in the circuits to define a "system of individual exemptions"; in its *Tenafly*

3. The *Smith* Court also distinguished cases it said involved "hybrid situation[s]," where not only free exercise, but other constitutional protections, such as freedom of speech and of the press, were involved. *Smith*, 494 U.S. at 881-82. Such a situation did not arise in this case, where the Third Circuit held that freedom of speech was not implicated because the rubber stripping did not constitute speech.

decision, the Third Circuit staked out the most radical position of any court to have addressed the issue. First, it held that evidence of non-uniform enforcement of a general, neutrally applicable law amounted to a system of exemptions sufficient to trigger strict scrutiny under the individualized exemptions prong of *Smith*. Second, the Third Circuit held that no showing of a substantial burden to religious exercise was necessary to require that an exemption be extended to religiously motivated conduct. Together and separately, these two holdings eviscerate *Smith*. Under the Third Circuit's tests, every time it can be shown that government has failed to perfectly enforce a neutral, generally applicable law, government must then grant blanket exemptions for any religiously motivated conduct, regardless of whether the neutral law substantially burdens the conduct in question.

The Third Circuit then compounded its extreme position by holding that avoiding an actual violation of the Establishment Clause cannot be a compelling reason to decline to grant a religiously-motivated exemption from a neutral, generally applicable law. This holding also conflicts with other circuits, which have held that avoiding an Establishment Clause violation constitutes a compelling state interest.

I. THE COURT SHOULD RESOLVE THE DISAGREEMENT AMONG THE CIRCUITS OVER WHAT CONSTITUTES A "SYSTEM OF INDIVIDUAL EXEMPTIONS" SUFFICIENT TO TRIGGER STRICT SCRUTINY UNDER *SMITH*.

Several interpretations of the "system of individual exemptions" have appeared in the federal courts. These interpretations can be arrayed along a continuum, from narrowest to most expansive. The narrowest understanding of *Smith* is that a "system of individual exemptions" arises only in the unemployment benefits context, as it did in *Sherbert*. A slightly broader reading interprets *Smith* to mean that a "system of individual exemptions" only exists where, by analogy to the unemployment context, the law in question expressly confers discretion on a government official to make case-specific determinations under the terms of the law, such as zoning determinations. A strikingly broader interpretation of *Smith* finds a "system of individual exemptions" to exist whenever a law by its terms distinguishes between different categories of acts, permitting some and prohibiting others. Finally, the most expansive reading of *Smith*, adopted by the Third Circuit in the *Tenafly* decision, holds that a "system of individual exemptions" can arise merely from authorities' incomplete enforcement of a neutral, generally applicable law.

It emerges from this continuum of interpretations of *Smith*'s category of "a system of individual exemptions" that there exists great uncertainty among the courts about where and how this category applies. The Third Circuit in *Tenafly* adopted the most extreme view of any court to date when it held that non-uniform enforcement of a neutral and generally applicable law amounted to such a system. The effect of the

rule is to gut *Smith* by reinstating the *Sherbert* test wherever it can be shown that a statute has not been enforced with perfect uniformity — which is to say, nearly always. The *Tenafly* case is worthy of being granted certiorari to clarify the meaning of the "system of individual exemptions" category of *Smith*.

A. The Circuits Are Divided Over The Proper Meaning Of A "System Of Individual Exemptions."

There are in the various circuits a range of other opinions of what constitutes a system of individual exemptions, and the Third Circuit's view deepens the split among them.

1. A "System of Individual Exemptions" Arises Only in the Narrow Unemployment Benefits Context. In *Smith*, the Court pointed out that it had "never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation," 494 U.S. at 883, in which "the State has in place a system of individual exemptions," *id.* at 884. Where such a system exists, government "may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.* (internal citation omitted). The Court's language would seem to imply that the system of individual exemptions mentioned by *Smith* is quite literally restricted to the unemployment benefits context. *See* 494 U.S. at 883 ("We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation."); *id.* at 884 ("Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law."). Indeed, one lower federal district court has so held. *See Jane*

L. v. Bangerter, 794 F. Supp. 1537, 1547 n.10 (D. Utah 1992) ("The Supreme Court has expressly stated that the holding regarding statutes with individual exemptions applies only in the unemployment compensation context.") (*citing Smith*, 494 U.S. at 883-84).

2. A "System of Individual Exemptions" Exists Only Where A Statute Explicitly Confers Discretion to Make Case-Specific Determinations. Several courts have held that a system of individual exemptions exists only where a statute confers discretion on a government official or officials to make case-specific determinations under the general terms of the law. This position has arisen most prominently in the zoning context. *See First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 181 (Wash. 1992) (*en banc*) (holding that local landmark ordinances triggered strict scrutiny because "they invite individualized assessments of the subject property and the owner's use of such property, and contain mechanisms for individualized exceptions" in the form of variances); *Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*, 963 P.2d 1315, 1345 n.31 (Hawaii 1998) (holding that a zoning law that provided for variances "clearly creates a 'system of individualized exemptions' from the general zoning law"); *Keeler v. Mayor and City Council of Cumberland*, 940 F. Supp. 879, 885-86 (D. Md. 1996) (holding that a historic preservation ordinance giving a landmark commission the right to preserve buildings "of unusual importance to the City, State or nation" triggered strict scrutiny because it provided for a system of individualized exemptions); *Rader v. Johnston*, 924 F. Supp. 1540, 1552 (D. Neb. 1996) (holding that a system of individualized exemptions exists where "administrators grant exceptions to the policy, at their discretion, in a broad range of circumstances not enumerated in the rule and not well defined or limited").

Perhaps more importantly, the view that discretionary zoning determinations amount to a "system of individual exemptions" under *Smith* would appear to underlie the logic of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (RLUIPA). RLUIPA, which seeks to reinstate strict scrutiny and the *Sherbert* compelling state interest test under a range of conditions, applies, *inter alia*, where a

> substantial burden [to religious exercise] is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved. 42 U.S.C. § 2000cc (a)(2)(C).

The language of RLUIPA is apparently intended to track the individual exemptions language of *Smith*. For RLUIPA to be plausibly constitutional it is necessary for "individualized assessments of . . . proposed uses" of property to amount to a system of individual exemptions under *Smith*.

The view that zoning or other discretionary government decisions amounts to a "system of individual exemptions" under *Smith* has, however, been rejected by several circuit courts, which have held that the mere conferral of discretion does not create a system of individual exemptions absent some evidence of actual systematic discrimination under the guise of discretion. Thus in *Rector of St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 354-55 (2d Cir. 1990), the Second Circuit rejected the claim that the New York City landmarks law, which required designating

as a landmark any property of historical or aesthetic importance, triggered strict scrutiny because landmark status was determined by the discretionary judgment of a government official as to whether a given property had historical or aesthetic importance. Instead the Second Circuit held that the New York City landmarks law was neutral and of general applicability. Accordingly, the court said, it was of "no constitutional relevance" that the law allowed for exercise of discretion "absent proof of the discriminatory exercise of discretion." *Id.* at 355. In *Daniels v. Arlington*, 246 F.3d 500, 505 (5th Cir. 2001), the Fifth Circuit considered a police regulation that banned the wearing of pins on police uniforms unless approved by the police chief. It held that because, under *Smith*, the regulation was "facially neutral and generally applicable," it did not trigger strict scrutiny. *Id.* This was so even though the regulation on its face permitted those pins that the police chief might deem appropriate. Likewise the Sixth Circuit has similarly held that conferral of discretion does not, by itself, institute a system of individual exemptions. *See Vandiver v. Hardin County Bd. of Educ.*, 925 F.2d 927 (6th Cir. 1991) ("individualized exemptions" prong of *Smith* "does not extend to a local school board's decision to select one of the two available methods for awarding academic credits to transferees into the public schools, as long as that decision is unaccompanied by any evidence of discriminatory intent against religion").

3. A "System of Individual Exemptions" Exists Where The Law Itself Distinguishes Between Different Categories of Acts. The Third Circuit adopted this view in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (*FOP*), which involved a challenge to a Newark police regulation that prohibited the wearing of beards by officers, but made a medical

exception for persons suffering from skin disease. The Court held that the regulation amounted to a system of individual exemptions and triggered strict scrutiny because it provided in its terms for an exception for non-religious reasons, namely health. *See FOP*, 170 F.3d at 364-65.

Several other circuits have rejected this view, holding instead that categorical exceptions do not on their own amount to a system of individual exemptions. In *American Friends Serv. Comm. v. Thornburgh*, 951 F.2d 957 (9th Cir. 1991), a Quaker organization sought an exemption from the Immigration Reform and Control Act, and argued that the Act created a system of individual exemptions because "the 'employer sanction' provisions contain exceptions for independent contractors, household employees and employees hired prior to November, 1986." *Id.* at 961. The Ninth Circuit rejected this argument: "But those exceptions exclude entire, objectively-defined categories of employees from the scope of the statute; they are not 'individualized exemptions' within the meaning of *Smith*." *Id.* What is more, the Court said, the statute created "no procedures whereby anyone 'applies' for any of these exemptions," and therefore "does not set up a procedure for exemptions based on 'individualized governmental assessment of the reasons for the relevant conduct' that would bring the [*Smith*] exception into play." *Id.* Similarly in *Swanson v. Guthrie v. Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 701 (10th Cir. 1998), the Tenth Circuit held that a school district's excepting fifth-year seniors and special education students from its "no-part-time-attendance" policy did not require strict scrutiny of refusal to allow a Christian home-schooled student to attend part-time, because these were categorical exemptions written into the school's policy. *See also Cornerstone Bible Church v.*

City of Hastings, 948 F.2d 464 (8th Cir. 1991) (holding that a zoning ordinance excluding church from commercial area is neutral law of general applicability).

4. A "System of Individual Exemptions" Is Created By Isolated Instances of Non-Uniform Enforcement of a Law. The most extreme position has now been advanced by the Third Circuit, which in the *Tenafly* decision held that evidence of several isolated instances of non-uniform enforcement of a neutral ordinance, standing alone, was sufficient to trigger strict scrutiny.[4] On this view, if government officials ever, through exercise of enforcement and prosecutorial discretion, fail to enforce a statute against non-religious conduct, then strict scrutiny is triggered, and the officials are barred from enforcing the law against religiously-motivated conduct. In *Tenafly*, the Third Circuit acknowledged expressly that the Tenafly ordinance barring attachment of any material to utility poles was neutral and generally applicable. It stated explicitly that if the Borough had enforced its ordinance "uniformly," then *Smith* "would control." Pet. App. at 35a. But the Borough's failure to enforce the law in four instances was sufficient for the Third Circuit to conclude that the Borough "tacitly or expressly granted exemptions from the ordinance's unyielding language." *Id.* at 35a-36a. By seeking to "apply" an ordinance that was "often-dormant" against the attachment of rubber stripping, the court said, Tenafly Borough created a system of individual exemptions that triggered strict scrutiny.

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4. The Third Circuit's position that non-uniform enforcement of a neutral, generally applicable law constitutes a system of individual exemptions is so extreme that no other court has so held. Indeed, no party argued this position before the Third Circuit, and no other court has even considered the theory that non-uniform enforcement, standing alone, can trigger strict scrutiny.

Although there was neither evidence nor even an allegation that anyone had ever sought an exemption from the ordinance before TEAI did so, the Third Circuit borrowed the language of selective prosecution to say that the "selective, discretionary" enforcement, *id.* at 37a, enabled government to consider "the reasons for the relevant conduct." Following this reasoning, the Third Circuit asserted that TEAI was "not asking for preferential treatment," *id.* at 40a, even though TEAI was seeking an exemption from a neutral statute. Rather, the court claimed, TEAI was "ask[ing] only that the Borough not invoke an ordinance from which others are effectively exempt." *Id.* The evidence of exemption was simply the four instances of non-uniform enforcement cited by the court. In other words, the fact of occasional non-uniform enforcement was held to require the granting of a statutory exemption for religiously motivated conduct.

B. The Third Circuit's Approach Eviscerates *Smith*'s Touchstones of Neutrality and General Applicability.

The Third Circuit's interpretation of *Smith* in *Tenafly* essentially reinstates *Sherbert* as the default rule for free exercise analysis. The holding in *Tenafly* may be understood as part of a concerted effort to eviscerate *Smith* that has been advocated by several prominent academics and numerous activist organizations. The *Tenafly* holding is even more extreme than the view that, in the words of one leading scholar, "religious practices are entitled to exceptions from regulatory laws in any situation where some secular practice also gets an exception," Douglas Laycock, Religious Freedom and International Human Rights in the United States Today, 12 Emory Int'l L. Rev. 951, 967 (1998).

The reason that the *Tenafly* decision eviscerates *Smith* is that, because of prosecutorial discretion and incomplete enforcement, nearly every law may be shown not to have been enforced under some circumstances. If strict scrutiny is triggered by non-uniform application of neutral, generally applicable laws, then strict scrutiny will be a ubiquitous element in the free exercise context. In practice, those who can assert religious motivations for illegal conduct will nearly always be able to get an exemption provided they can show instances of non-enforcement. By analogy, in a case like *Smith* itself, in which drug laws were being challenged on free exercise grounds, evidence of prosecutorial discretion in the enforcement of drug laws would similarly have triggered strict scrutiny.

II. THIS COURT SHOULD RESOLVE THE SPLIT BETWEEN THE CIRCUITS AS TO WHETHER AN EXEMPTION FROM A NEUTRAL, GENERALLY APPLICABLE LAW MUST BE GIVEN, EVEN WITHOUT A SHOWING OF A SUBSTANTIAL BURDEN ON RELIGIOUS EXERCISE.

The courts of appeals disagree as to whether substantial burden analysis is required where, as in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, a law directly targets religious exercise. In *Lukumi*, where the Court held the laws in question to be specifically and only targeted at the Santeria religion, there was no detailed analysis of the substantial burden issue. *See Lukumi*, 508 U.S. at 531-47. But the *Lukumi* Court began its analysis by acknowledging the centrality of the religious practice of animal sacrifice at the heart of the case to Santeria practitioners' religious exercise. The Court stated that "petitioners' assertion that animal sacrifice is an integral part of their religion 'cannot be deemed bizarre or

incredible,'" 508 U.S. at 531 (citing *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829, 834, n.2 (1989)). The Court further specified that "[n]either the city nor the courts below . . . have questioned the sincerity of petitioners' professed desire to conduct animal sacrifices for religious reasons." 508 U.S. at 531. By omitting a detailed substantial burden analysis, while crediting the claim of centrality and noting that the issue was not raised below, the *Lukumi* Court created some ambiguity on the question of whether substantial burden analysis was required where a non-neutral law directly targeted a specific, identifiable religious practice.

Seizing upon that ambiguity in *Lukumi*, the Third Circuit held, first in *Borough of Mahaffey*, 35 F.3d at 849-50, and again in *Tenafly*, that where a law is not neutral and generally applicable, but discriminates against religion, substantial burden analysis is not necessary. Based on a reading of *Smith* and *Lukumi* that has been gestating within the Third Circuit for several years, the Third Circuit in *Tenafly* has developed a test for violation of the Free Exercise Clause that omits any consideration of whether a claimant's religious exercise has been substantially burdened.[5] First the Court determines whether discrimination has occurred. A finding of discrimination may be satisfied by mere evidence that a neutral, generally applicable law has been incompletely enforced. If "discrimination" is found, the court then decides whether there was a compelling interest for that discrimination. If there is no finding of compelling interest, the Third Circuit holds that the remedy is to compel government to exempt any religiously motivated conduct — but not other conduct — from the law in question.

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5. *See FOP*, 170 F.3d at 364-67 and *Brown v. Borough of Mahaffey*, 35 F.3d 846, 849-850 (3d Cir. 1994).

Thus, having concluded that the non-uniform enforcement of the Tenafly sign ordinance constituted a system of individual exemptions under *Smith*, the Third Circuit went on to demand strict scrutiny even absent a showing that the ordinance substantially burdened religious exercise.[6] The court flatly stated that "[u]nder *Smith* and *Lukumi* . . . there is no substantial burden requirement when government discriminates against religious conduct." Pet. App. 41a. This proposition is flatly wrong.

Although no other circuit has abolished substantial burden analysis entirely,[7] two other circuits have joined the Third Circuit in holding that substantial burden analysis is unnecessary where a law directly targets religious exercise as it did in *Lukumi*. In *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995), the Sixth Circuit evaluated a military regulation that completely banned certified child care providers from inculcating religion to their charges. The court explained that this regulation was not neutral or generally applicable, but targeted religious activity. *Id.* at 978. Therefore, the court said, it was not necessary to show a substantial burden. *Id.* at 979 n.4. At the same time, the Sixth Circuit made it very clear that the *Sherbert* test was still appropriate "to judge those situations in which a neutral and generally applicable regulation imposes an indirect, albeit substantial, burden on the practice of religion."

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6. The Borough has asserted throughout the case that Respondents cannot make out a showing of a substantial burden. Neither the district court nor the Third Circuit found that the Respondents had been subjected to a substantial burden to their religious exercise.

7. The Third Circuit acknowledged as much in a long if imprecise footnote citing cases from nine circuits that disagreed. *See* Pet. App. 42a, n.31.

Id. at 979 n.3. Thus, the Sixth Circuit agreed with the Third Circuit that under *Lukumi*, where a law is not neutral and generally applicable, substantial burden analysis is not required, but it disagreed with the Third Circuit regarding a system of individual exemptions, and it held expressly that where a law *is* neutral and generally applicable, the substantial burden test applies.

The Ninth Circuit shares the same view as the Sixth. *See Davey v. Locke*, 299 F.3d 748, 753-54 (9th Cir. 2002); *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1393 (9th Cir. 1994); and *Am. Family Ass'n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1124 (9th Cir. 2002). In *Davey*, the court held that a Washington statute that denied funding to students studying theology from a religious perspective targeted religious conduct and was not neutral or generally applicable. The court applied strict scrutiny under *Lukumi* without addressing the substantial burden question. In *Vernon*, the Ninth Circuit applied the *Sherbert* test with the requirement of a substantial burden. In *Am. Family Ass'n*, the Ninth Circuit posited a distinction between a "law targeting religious beliefs" under *Lukumi* and government action that was not "regulatory, proscriptive or compulsory," *i.e.* "something other than an actual law." 277 F.3d at 1124. It held that a substantial burden was required in the latter situation. The Ninth Circuit thus appears to agree with the Third and Sixth Circuits that a law targeting religion under *Lukumi* need not substantially burden religion to be subject to strict scrutiny, but like the Sixth Circuit, it requires a substantial burden when *Sherbert* applies.

On the other side of the *Lukumi* split are those courts that require a substantial burden before the Free Exercise Clause is implicated, and hence would require a substantial

burden even where *Lukumi* applied. In *Levitan v. Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002), the D.C. Circuit held in no uncertain terms that "the First Amendment is implicated when a law or regulation imposes a substantial, as opposed to inconsequential, burden on the litigant's religious practice." The *Levitan* court specifically cited *Lukumi* for the proposition that the Free Exercise Clause is only implicated where there is a substantial burden to religious exercise. *Id.* at 1321 (describing *Lukumi* as a case "in which the practice at issue is indisputably an important component of the litigants' religious scheme") (emphasis added). In *Goodall by Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 173 (4th Cir. 1995), the Fourth Circuit held that if a law were not generally applicable, the substantial burden requirement would still apply. Analyzing the appellant's claim under the substantial burden standard, the court found that it did not rise to the level of substantiality when the claimed burden was increased cost. *Id.* at 171. In *Church of Scientology v. City of Clearwater*, 2 F.3d 1514 (11th Cir. 1993), the Eleventh Circuit, after finding that *Smith* did not apply to an ordinance that targeted religious and charitable activities, *id.* at 1543, said explicitly that "[u]nder the Free Exercise Clause we apply strict scrutiny to legislation that imposes a substantial burden on the observation of a religious belief or practice," *id.* at 1549. That is, the Eleventh Circuit requires a finding of a substantial burden before it finds the Free Exercise Clause implicated by a law that targets religious activity in particular.

It thus follows that on the question whether substantial burden analysis is required even where *Lukumi* applies, there exists a split between the Third, Sixth, and Ninth Circuits on the one side, and the D.C., Fourth, and Eleventh Circuits on the other.

The Third Circuit is alone, however, in its remarkable holding that *Smith* permanently abolished all substantial burden analysis in any context. In so holding in *Tenafly*, the Third Circuit relied on *Smith*'s language admonishing courts to avoid "[j]udging the centrality of different religious practices," 494 U.S. at 887. From this language, the Third Circuit concluded that, even where a system of individual exemptions triggers the old *Sherbert* test, a substantial burden to religious exercise is no longer needed after *Smith*. Pet. App. at 41a. But *Smith*'s warning against the dangers of weighing religious importance was intended to explain why courts should not force states to grant exemptions to neutral, generally applicable laws. It was not intended to hold that courts must force states to grant those exemptions even absent a substantial burden.

Smith did not create some new version of the *Sherbert* test. In characterizing *Sherbert* as a case involving a system of individual exemptions, the *Smith* Court did no more than preserve the *Sherbert* test in certain circumstances. *Sherbert* expressly requires a finding of substantial burden to religious exercise before the state may be called upon to show a compelling interest. It cannot possibly follow that under *Smith*, the substantial burden requirement of *Sherbert* was somehow lifted.

In other words, the Third Circuit has turned the logic of *Smith* on its head. In the Third Circuit's view, *Smith* actually makes it easier, not more difficult, for a private party to insist that the state provide a statutory exemption for religiously motivated conduct. No other circuit has held that, where a system of individual exemptions to a neutral, generally applicable law exists, strict scrutiny is triggered even absent a substantial burden to religious exercise. To the contrary,

the other circuits require a showing of a substantial burden whenever they apply strict scrutiny after *Smith*. The Third Circuit acknowledged as much in its decision in this matter. *See* Pet. App. 42a, n.31 (citing, *inter alia*, *Strout v. Albanese*, 178 F.3d 57, 65 (1st Cir. 1999) (applying strict scrutiny only where government "has placed a substantial burden on the observation of a central belief or practice") (internal quotation marks omitted) (emphasis in original); *United States v. Grant*, 117 F.3d 788, 793 (5th Cir. 1997) (applying substantial burden test to supervised release order and finding no free exercise violation in the absence of a substantial burden); *Fleischfresser v. Dirs. of Sch. Dist. 200*, 15 F.3d 680, 689-90 (7th Cir. 1994) (requiring substantial burden as prerequisite for free exercise claim and concluding that school's reading program did not substantially burden parents' free exercise); *Altman v. Minn. Dep't of Corrections*, 251 F.3d 1199, 1204 (8th Cir. 2001) ("Government significantly burdens the exercise of religion if it significantly constrains conduct or expression that manifests a central tenet of a person's religious beliefs, meaningfully curtails the ability to express adherence to a particular faith, or denies reasonable opportunities to engage in fundamental religious activities.")). The Third Circuit thus stands alone in its extraordinary interpretation of *Smith*.

III. THIS COURT SHOULD RESOLVE THE SPLIT BETWEEN THE CIRCUITS ON WHETHER AVOIDING AN ACTUAL ESTABLISHMENT CLAUSE VIOLATION CONSTITUTES A COMPELLING INTEREST AGAINST GRANTING A RELIGIOUS EXEMPTION.

The Third Circuit considered and rejected the holding, adopted by the District Court, that even if it were appropriate to subject the ordinance to strict scrutiny, the Borough

was justified in its actions by a compelling governmental interest in avoiding an Establishment Clause violation. The Establishment Clause would be violated, the District Court said, by affording preferential use of closed government property to a religious group. Pet. App. at 149a-156a. The Third Circuit applied the endorsement test to the government conduct. It acknowledged that if the Borough had provided a religious exemption for the rubber stripping, then a reasonable, informed observer would know that TEAI was a religious organization that was being preferentially treated. "[B]ut," said the court, a reasonable observer "would also know that the borough was allowing [the rubber strips] to remain on utility poles only because its selective application of Ordinance 691 render[ed] removing the lechis a free exercise violation." Pet. App. at 55a.

The court's holding logically depends on the assumption that denial of the exemption to TEAI amounted to a free exercise violation. Preferential treatment of a religious group that would normally violate the Establishment Clause, the court held, would not violate that Clause *because the conduct results from an obligation that follows from a free exercise violation*. But this circular reasoning puts the cart before the horse. The Borough had not yet violated the Free Exercise Clause when TEAI approached it requesting an exemption for its religiously motivated conduct. The very question before the Court, then, was whether the Borough committed a free exercise violation by refusing to grant an exemption that would preferentially treat religious conduct. If there were a compelling interest for the refusal, then no free exercise violation would exist. The Third Circuit's conclusion amounts to the holding that, where denying a religiously motivated exemption could be construed as a free exercise

violation, an Establishment Clause violation cannot be a compelling state interest for denying the exemption.

It follows from the Third Circuit's reasoning that avoiding an Establishment Clause violation can never constitute a compelling interest for refusing a religious exemption. After *Smith*, the only situation in which a compelling interest is ever required is one in which there exists a system of individual exemptions or a hybrid free exercise claim. In the view of the Third Circuit, it would always constitute "discrimination" to deny an exemption to a religious group under these circumstances. Thus the Third Circuit now denies that avoiding an Establishment Clause violation can ever constitute a compelling state interest in the free exercise context.

This holding places the Third Circuit in conflict with two circuits that have held that avoiding an Establishment Clause violation does constitute a compelling state interest. In *Goodall*, *supra*, the Fourth Circuit considered the claim that it was a free exercise violation to deny state support for the religious education of a deaf child. Stating that "[i]t is the well-settled law of the Fourth Circuit that the avoidance of a violation of the Establishment Clause of the First Amendment constitutes such a compelling state interest," 930 F.2d. at 370, the court, applying *Sherbert*, declined to find a free exercise violation on the theory that providing the funding would violate the Establishment Clause.

The First Circuit reached a similar conclusion in *Strout v. Albanese*, *supra*, in assessing the constitutionality of a Maine law that barred direct state support for religious schools. The court held: "We highlight the proposition that in some cases in which state infringement on the free exercise

of religion takes place, otherwise prohibited conduct may be permitted if the state establishes an overriding societal interest. Upholding the Establishment Clause . . . is such a paramount interest." 178 F.3d at 61. In both *Goodall* and *Strout*, there would arguably have been no Establishment Clause violation had a reasonable observer known that the special accommodation for religion was being made as a result of a free exercise violation. The Third Circuit is thus in conflict with the First and Fourth Circuits on the important question of whether avoiding an Establishment Clause violation is a compelling interest that justifies what would otherwise be a free exercise violation. This Court should grant certiorari to resolve the split.

CONCLUSION

For the reasons outlined above, Petitioners respectfully request that this Court grant the within Petition for a Writ of Certiorari.

Respectfully submitted,

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